IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1767

WILMINGTON TRUST COMPANY,
as Successor Indenture Trustee,

Petitioner,

v.

PENN CENTRAL TRANSPORTATION COMPANY,
as Debtor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD G. ELLIOTT, JR.,
MICHAEL A. MEEHAN,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
P. O. Box 551,
Wilmington, Delaware. 19899
Attorneys for Wilmington Trust Company.

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International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Wilmington Trust Company, as successor indenture trustee under the New York Central and Hudson River Railroad Company, Michigan Central Collateral Indenture dated April 13, 1898 ("WTC"), respectfully prays that a Writ of Certiorari ("Writ") issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding.

OPINIONS BELOW.

The opinions rendered by the Court of Appeals in this case (the "*Wilmington Opinion*"), and in the companion cases (the "*Irving Opinion*" and the "*Bankers Opinion*") are not yet reported and appear in the Appendix hereto (App. A1-A61; A65-A115; A118-A121). The opinion rendered by the Court of Appeals in connection with WTC's initial petition for rehearing, not yet reported, and the order denying WTC's second petition for rehearing appear in the Appendix hereto (App. A124-A126; A129). The opinions rendered by the United States District Court for the Eastern District of Pennsylvania (the "Reorganization Court") are reported at 458 F. Supp. 1234 (the "*Approval Opinion*") and 458 F. Supp. 1364 (the "*Confirmation Opinion*"), respectively, and appear in the Appendix hereto (App. A130-A356; A357-A393).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on January 11, 1979 (App. A62-A64). A timely petition for rehearing, or, in the alternative, rehearing en banc was denied on February 26, 1979 (App. A127-A128). A second timely petition for rehearing was denied on March 22, 1979 (App. A129). This petition for certiorari was filed within 90 days of the date on which the Court of Appeals denied WTC's first petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 11 U.S.C. § 47(c).

QUESTIONS PRESENTED.

1. Whether the Supreme Court should assert its supervisory powers when the Court of Appeals committed an obvious and injurious error in denying WTC's initial petition for rehearing on the ground that WTC failed to assert a claim to certain assets when WTC explicitly asserted such claim in each of its briefs filed with the Court of Appeals.

2. Whether the treatment afforded by a plan of reorganization to a secured creditor could be found to be fair and equitable when all of the collateral securing that creditor's claim was not considered by either the Reorganization Court or the Court of Appeals.

3. Whether a secured creditor received fair and equitable treatment under a plan of reorganization when neither the Reorganization Court nor the Court of Appeals conducted an informed evaluation of the reasonable range of litigation possibilities.

STATUTORY PROVISIONS INVOLVED.

Section 77(e) of the Bankruptcy Act, 11 U.S.C. § 205(e), provides in pertinent part that a plan of reorganization may not be approved unless the court finds that it is:

> "fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders . . . ."

STATEMENT OF THE CASE.

This proceeding commenced on June 21, 1970, when Penn Central Transportation Company (the "Debtor" or "PCTC") filed a petition with the Reorganization Court seeking relief under the provisions of the Bankruptcy Act, 11 U.S.C. § 1 *et seq.* Jurisdiction of the Reorganization Court was invoked pursuant to § 77 of the Bankruptcy Act, 11 U.S.C. § 205.

A. History of This Indenture.

WTC is successor trustee under the New York Central and Hudson River Railroad Company ("New York C. & H.R.R."), Michigan Central Collateral Indenture dated April 13, 1898 ("MCC Indenture" or the "Indenture"). Bonds were issued under the MCC Indenture for the purpose of financing the acquisition by Debtor's predecessor of the stock of the Michigan Central Railroad Company ("Michigan Central"). The trustee under the Indenture received 168,143 shares of Michigan Central stock for the bonds issued under and secured by the Indenture.

As further security for the payment of principal and interest, the MCC Indenture, along with the Lake Shore Collateral Indenture ("Lake Shore Indenture"), was secured by a lien on certain property located in mid-town Manhattan (the "Park Avenue Properties"), which lien is senior to the lien of the bonds issued under the New York C. & H.R.R. Consolidation mortgage (Mortgage 014) ("Consolidation Mortgage"). The liens of this Indenture, the Lake Shore Indenture and the Consolidation Mortgage on the Park Avenue Properties are junior to the lien of the New York C. & H.R.R. Gold Bond mortgage (Mortgage 013) ("Gold Bond Mortgage"). The most junior mortgage in this mortgage chain, referred to as the "013-015 Chain", is the New York C. & H.R.R. R.&I. mortgage (Mortgage 015) ("New York Central R&I Mortgage").

Thus, the Indenture is secured as follows:

1. By a first lien on 168,143 shares of Michigan Central stock, which the Reorganization Court and the Debtor's trustees value at $25,195,000 (App. A47; A235-A236).

2. By a second lien on the Park Avenue Properties which includes:

(a) Specific Park Avenue Properties which, before satisfaction of the Gold Bond Mortgage ($97 million), the Reorganization Court found to have a value of $236 million (App. A235-A236);

(b) Certain property subject to the Harlem Lease which has a value of $48.2 million. Though subject to the lien of the MCC Indenture, this property was incorrectly allocated to the New York Central R&I Mortgage (App. A270); and

(c) Rentals received in respect of the Park Avenue Properties during the pendency of the reorganization which have a value of $76 million, net of taxes. Though subject to the lien of the MCC Indenture, this property has been incorrectly allocated to the New York Central R&I Mortgage (App. A112-A113).

The claim of this Indenture to the Harlem Lease properties and the Park Avenue rentals was raised as early as February 23, 1972. As to the Park Avenue rentals, WTC's predecessor indenture trustee moved before the Reorganization Court for an order sequestering the rentals from the Park Avenue Properties (Ct. App. Vol. II, A-1, A-11[1]). The motion was denied by the Reorganiza-

1. Reference to the appendices filed with the Third Circuit, which are part of the certified record filed with this Court, will be made thusly: "Ct. App. Vol. —, A—".

tion Court on the ground that the rentals from the Park Avenue Properties were needed by the PCTC trustees in connection with their efforts to effect a successful reorganization. *In re Penn Central Transportation Co.*, 354 F. Supp. 717, 746-47 (E.D. Pa. 1972), *aff'd*, 484 F.2d 323 (3d Cir.), *cert. denied*, 414 U.S. 1079 (1973).

B. The Plan of Reorganization.

Prior to the consummation of Debtor's plan of reorganization ("the Plan"), the claim of the bondholders under the MCC Indenture for principal and interest to December 31, 1977 was $21,856,000 (App. A229). Under the Plan, all Debtor's 28 secured creditors holding mortgages or collateral trusts are treated as a single class. All 28 Class J creditors are assumed to be fully secured, either by retained assets or conveyed assets,[2] and receive a distribution in respect of their claim of 10% cash, 30% General Mortgage Bonds, 30% Preference Stock and 30% New Common Stock (App. A227).

As initially proposed, the Plan made but a single distinction as among the 28 Class J creditors. Thus, the Plan originally recognized the relatively stronger position of creditors fully or partially secured by retained assets of the Debtor through its formula for distribution of General Mortgage Bonds. The bonds were divided into Series A and B. Within the 30% of the total distribution represented by the General Mortgage Bonds, each secured creditor was awarded Series A Bonds in proportion to the degree that its claim was secured by Debtor's retained assets. The remainder of the 30% was satisfied with Series B Bonds. For example, a claim of $1,000 which is 70% secured by retained assets would receive $210 in Series A

2. On April 1, 1976, a significant portion of Debtor's rail property was transferred to ConRail. The value of the property so conveyed is presently unknown and is to be determined in what has been referred to in this proceeding as the "Valuation Case".

Bonds and $90 in Series B Bonds. If such claim were fully secured by retained assets, it would receive $300 in Series A Bonds and if it had no retained asset security, it would receive $300 in Series B Bonds (A227-A228).

Series A Bonds are to be redeemed out of the proceeds of the sale of the marketable assets retained by the Debtor prior to the Series B Bonds. Series B Bonds look to the proceeds of the Valuation Case for payment, in respect of which their claim is junior to an estimated $1.278 billion of government, state and local tax claims. Series B Bonds not redeemed in the Valuation Case will convert into common stock of the reorganized company (App. A74).

C. The Reorganization Court Opinions.

The Reorganization Court approved the Plan but altered its treatment of Class J creditors by creating a class of so-called "super-secured creditors" consisting of the Mohawk & Malone Mortgage (275% retained asset coverage), the Gold Bond Mortgage (243% retained asset coverage), the New York Central 6% Bonds of 1990 (113% to 119% retained asset coverage) and the Penn Central 6½% Bonds of 1993 (123% to 138% retained asset coverage). Those claimants were deemed entitled to receive a distribution of Series A Preference Stock which has rights of redemption, *pari passu*, which rights take precedence over the redemption rights of other preference stock. See, *In re Penn Central Transportation Co.*, 458 F. Supp. 1234, 1291, 1302 (E.D. Pa. 1978) (App. A234-A235; A257-A258).

Though the Reorganization Court recognized that the MCC Indenture had first lien retained asset coverage of 115% based on its lien on the Michigan Central stock (App. A236), the Indenture was not included as a member of this judicially created class. In addition, the Reorganiza-

tion Court did not give the Indenture any credit for its second lien on the Park Avenue Properties, which the Court valued at $236 million. This value did not include certain of the Harlem Lease properties or the Park Avenue rentals (App. A270; A273-A277). The Court allocated the entire $236 million to the Gold Bond Mortgage, thus finding it to be 243% retained asset secured (App. A236).

D. The Court of Appeals Opinions.

The Court of Appeals directed that another change be made in connection with the Plan's treatment of Class J creditors. It concluded that the Mohawk & Malone Mortgage was entitled to a distribution of 10% cash and 90% Series A Bonds (App. A104). In addition, it reversed the Reorganization Court's rejection of the New York Central R&I Mortgage claim for recognition of its security interest in the Park Avenue rentals. The Court of Appeals remanded the issue to the Reorganization Court for a determination of the value of the rentals and whether that value would increase the retained assets securing the New York Central R&I Indenture (App. A112-A113), thus increasing the portion of Series A General Mortgage Bonds to be distributed under that Indenture.

As the Reorganization Court had done, the Court of Appeals' consideration of the fairness of the Plan as to the MCC Indenture was based on the Reorganization Court's finding that the Park Avenue Properties were worth only $236 million; a consideration which did not include certain of the Harlem Lease properties and the Park Avenue rentals (App. A47-A48; A55-A56).

REASONS FOR GRANTING THE WRIT.

I. The Supreme Court Should Assert Its Supervisory Powers When the Court of Appeals Committed an Obvious and Injurious Error in Denying WTC's Initial Petition for Rehearing on the Ground That WTC Failed to Assert a Claim to Certain Assets When WTC Explicitly Asserted Such Claim in Each of Its Briefs Filed With the Court of Appeals.

The Court of Appeals committed an obvious and injurious error which demands that this Court assert its "power of supervision" under Rule 19(1)(b) when the Court of Appeals denied WTC's initial petition for rehearing on the grounds it did not assert a claim to the Park Avenue rentals.

In its order of May 19, 1978, the Court of Appeals urged the numerous appellants to avoid duplication of argument and materials in their respective briefs to the extent possible (App. A397). In compliance with that direction, the trustee for the New York Central R&I Mortgage carried the laboring oar on the issue of the rentals received on the Park Avenue Properties and the Consolidation Mortgage carried the laboring oar on the Harlem Lease properties. WTC, while raising those issues in its briefs,[3] carried the laboring oar in respect of other issues.

In the *Irving Opinion*, the Court of Appeals held that the Reorganization Court had erroneously rejected the claim of the New York Central R&I Mortgage for recognition of its security in the net rentals from the Park

3. Opening Brief at 7, 21, 23, 27; Reply Brief at 10, 12. WTC's Opening Brief and Reply Brief, each of which was filed with the Court of Appeals, have been certified in connection with this Petition as part of the entire record below. Because the appendix filed in connection with this Petition is already voluminous, WTC has, in the interest of economy, chosen not to reproduce its briefs below as part of the appendix.

Avenue Properties (App. A112-A113). However, in the *Wilmington Opinion,* the Court of Appeals failed to include and consider WTC's claim to the Park Avenue rentals in its determination of the Plan's fairness.

Although WTC brought this error to the attention of the Court of Appeals in its initial petition for rehearing, the Court of Appeals declined to grant relief to WTC. In so doing, the Court of Appeals initially stated that WTC had made no objection in its briefs or at oral argument to the diversion of the Park Avenue rentals (App. A125).

That statement is simply erroneous. WTC specifically objected to the diversion of the Park Avenue rentals both in its Opening and Reply Briefs filed with the Court of Appeals. In its Opening Brief, WTC stated:

> "Unlike other 'super-secured' creditors the MCC Indenture looks to the extremely valuable Park Avenue Properties, the income of which has been financing PCTC's reorganization proceeding for the past seven years, and substantially all of the stock of the Michigan Central, one of PCTC's largest and most valuable leased lines." (Opening Brief at 7).

This objection was reasserted by WTC in its Reply Brief:

> "The Park Avenue properties are unique; for, as this Court has noted, the properties are an essential ingredient to any reorganization of the Debtor. *In re Penn Central Transportation Co.*, 484 F.2d 323, 334 (3d Cir.), *cert. denied,* 414 U.S. 1079 (1973). It is difficult to imagine how long this proceeding would have lasted if it had not been for the use of the Park Avenue rentals which exceeded $76,000,000, net of taxes. The MCC Indenture should not be penalized by subjecting this unique asset to the payment of administrative claims because it has, in effect, supported this reorganization." (Reply Brief at 10).

As its second, and only other ground for denying WTC's petition for reargument, the Court of Appeals stated that WTC did not rely upon the availability of the Park Avenue rentals in its liquidation analysis (App. A125).

That statement is also erroneous. WTC specifically set forth the Park Avenue rentals in its liquidation analysis presented to the Court of Appeals. WTC argued that if the Park Avenue rentals had been included, the collateral securing the Gold Bond Mortgage would be increased and the increase would then pass down to the MCC Indenture, making the MCC Indenture even more secured in a liquidation:

> "If the value of the collateral securing the Gold Bond mortgage is increased by the addition of the Harlem Lease ($48.2 million) or increased to take into account the rental payments received by the estate on the Park Avenue properties ($76 million), the excess over 200% which passes down to the MCC Indenture is further increased, thereby making the MCC Indenture even more secure." (Reply Brief at 12).

Not only is the error of the foregoing rulings apparent, but the result is in direct conflict with the prior opinion of the Court of Appeals rendered at an earlier stage of this proceeding. In *In re Penn Central Transportation Co.*, 484 F.2d 323 (3d Cir.), *cert. den.*, 414 U.S. 1079 (1973), the Court found that the New York Central R&I Mortgage was the most junior within the 013-015 Chain, 484 F.2d at 330, and that the rentals on the Park Avenue Properties were among the collateral securing the 013-015 Chain, subject to the priorities within that chain. 484 F.2d at 337.[4]

4. The Opinion of the Court of Appeals also ignores that Court's prior order to the parties to avoid duplication of argument in briefing. (See, App. A397).

Though it is not possible to speculate why the Court of Appeals did what it did, it should be noted that the Lake Shore Indenture trustee also moved for rehearing. In its petition, the Lake Shore Indenture trustee acknowledged that it had not raised the subject of the Park Avenue rentals in its briefing before the Court of Appeals. Evidentally, the Court of Appeals seized upon this admission as the basis for its opinion.

The injury caused thereby is equally apparent. For example, implicit in the Court of Appeal's analysis of the fairness of the Plan as to the MCC Indenture is the conclusion that the Reorganization Court's value of $236 million for the Park Avenue Properties would be sufficient to satisfy the $97 million Gold Bond Mortgage, under worst case assumptions, leaving nothing for the MCC Indenture. With the addition of the Park Avenue rentals, approximately $60 million would pass through to the second tier claimants (See, App. A112, n.14). Since the MCC Indenture shares a second lien with the Lake Shore Indenture, it would, for analytical purposes, be entitled to 50% of the value, or a total of approximately $30 million. When added with the Michigan Central stock, the MCC Indenture would have a claim to $55.2 million in assets, and thus would be 253% secured—well above the percentage for super-secured status set by the Reorganization Court.

The effect of an increase in collateral securing the Gold Bond Mortgage was conceded by counsel for the Debtor's trustees at argument before the Court of Appeals. He acknowledged that an increase in the value of the Park Avenue Properties of only $48.2 million (referring to the Harlem Lease properties) would be sufficient to give the MCC Indenture super-secured status (transcript of argument before the United States Court of Appeals, October 16, 1978, at 1-151).

At a minimum, the effect of super-secured status is to substitute Series A Preference Stock for Series B Preference Stock. As the Court recognized in the *Irving Opinion*, the value of the "preference afforded by classification in Series A is substantial" (App. A78).

Under Rule 19(1)(b) of this Court, a writ of certiorari may be granted where a decision of a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." This Court has exercised its discretion under Rule 19 in order to correct plain and obvious error below even though the substantive legal question at issue was not of the type usually considered by this Court.

Thus, in *Gibson v. Lockheed Aircraft Service, Inc.*, 350 U.S. 356 (1956), the Court, in a *per curiam* opinion, reversed a decision of the court of appeals relating to the correctness of a charge made by the district court to the jury. Although the substantive legal issue in *Gibson* was not particularly significant, the Court noted that its consideration of that case was based upon its supervisory power over lower federal courts. In a concurring opinion, Mr. Justice Frankfurter agreed that the issuance of a writ of certiorari was proper since the rulings below were "so obviously and injuriously erroneous 'as to call for an exercise of this court's power of supervision.'" 350 U.S. at 358. In *Kaiser Steel Corp. v. Ranch Co.*, 391 U.S. 593 (1968), the Court issued a writ of certiorari and, at the same time, reversed the decision below on the ground that the refusal of the lower court to stay its hand pending decision by a state court on issues relating to the matter constituted an abuse of "sound judicial administration".

391 U.S. at 594. See, *Washington v. United States,* 357 U.S. 348 (1958) [*per curiam,* issuing writ and reversing court of appeals on issue relating to sufficiency of evidence]; Cf. *Letulle v. Scofield,* 308 U.S. 415 (1940) [writ issued where petitioner asserted that the court of appeals decided the case on issues not raised or argued below].

WTC submits that the Third Circuit's *per curiam* opinion denying WTC's initial petition for rehearing, is, to use Mr. Justice Frankfurter's phrase, so obviously and injuriously erroneous as to call for the exercise of this Court's power of supervision. Furthermore, the issuance of a Writ and the ultimate reversal of the Court of Appeals will not impose any additional burden on either the Reorganization Court or upon counsel since this issue is already before the Reorganization Court, insofar as it relates to the New York Central R&I Mortgage and the Debtor has represented that it has sufficient securities to satisfy the relief sought by WTC.

WTC respectfully submits that the error of the Court of Appeals presents this Court with one of the admittedly few cases that called for the issuance of a Writ in the exercise of this Court's supervisory power over inferior federal courts.

II. The Treatment Afforded by the Plan of Reorganization to the MCC Indenture Bondholders Could Not Be Found to Be Fair and Equitable When All of the Collateral Securing That Creditor's Claim Was Not Considered by Either the Reorganization Court or the Court of Appeals.

The Supreme Court last considered plans of reorganization in 1968. *Protective Committee for Independent Stockholders of TMT Trailer-Ferry, Inc. v. Anderson,* 390

U.S. 414 (1968). Since that date there have been numerous complex reorganizations all raising substantial questions as to the applicability of priority rules under the Bankruptcy Act. See *e.g., In re Equity Funding Corp.,* 416 F. Supp. 132 (C.D. Cal. 1975). There has been a growing tendency, as evidenced by Debtor's Plan, to lump secured creditors in a single class, to minimize collateral value and ignore lien priority, all under the pretext of complexity.

In the *Wilmington Opinion,* the Court of Appeals valued the Park Avenue Properties at $236 million, without considering the MCC Indenture's claim to the rentals as recognized in the *Irving Opinion* and without considering or much less discussing the Harlem Lease properties. By not considering all the collateral securing the MCC Indenture, the Court of Appeals could not determine whether the Plan's distribution to the MCC Indenture bondholders was fair and equitable as mandated by this Court in *Consolidated Rock Products Co. v. DuBois,* 312 U.S. 510, 526-27 (1941).

The Court of Appeals in the *Wilmington Opinion* then erroneously held that under *Ecker v. Western Pacific R. Corp.,* 318 U.S. 448, 482-83 (1943), it was not required to conduct an evaluation of the collateral securing the MCC Indenture, as that was a matter to be determined under the circumstances of each case (App. A54). The Court concluded that it would be "impossible" to place a value on the rights surrendered by MCC Indenture bondholders, given the complexity of the Plan, the unpredictable prior claims, and the benefits to be derived by implementing some plan now (App. A54). In so holding, the Court of Appeals in the *Wilmington Opinion* disregards its own decision in the *Irving Opinion* where the Court does place values on the rights surrendered by Class J creditors (compare, A95-A102), and ignores the

requirements of this Court's decisions in *Consolidated Rock* and *Ecker*.

Having abdicated its obligation to value all the collateral securing the MCC Indenture, the Court of Appeals, as the Reorganization Court before it, refused to apply equitable principles of marshalling and concluded that collateral would be allocated only to senior creditors, notwithstanding the existence of a possible surplus following satisfaction of that creditor's claim (App. A48-A49; A55-A56). Thus, the Court of Appeals considered only the value of the Michigan Central stock (App. A48). Not considered, over the objection of WTC, was any excess value, such as the Park Avenue rentals or the Harlem Lease properties, that would flow to the MCC Indenture after satisfaction of the Gold Bond Mortgage. By refusing to consider this collateral, the Court of Appeals has, in effect, ruled that a valuable third mortgage is worth the same as a worthless second mortgage—nothing.

As a result, the Plan, as approved by the Reorganization Court and the Court of Appeals, does not recognize the priorities among the differently secured Class J creditors. For example, the MCC Indenture, which is secured by a first lien on Michigan Central stock and has a lien prior to the lien of the Consolidation Mortgage on the Park Avenue Properties, receives the same treatment under the Plan accorded the Consolidated Mortgage. For that reason, the Plan does not "conform to the requirements of the law of the land regarding the participation of the various classes of creditors," Bankruptcy Act § 77(e), and this Court has never affirmed the approval or confirmation of a plan that failed to recognize the priorities of existing classes of creditors. See, *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482 (1913); *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445 (1926); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), *reh. den.*, 308 U.S. 637 (1939); *Consolidated Rock Products Co. v. DuBois, supra; Marine Harbor Properties, Inc. v. Manufacturers Trust Co.*, 317 U.S. 78 (1942); *Ecker v. Western Pacific R. Corp., supra; Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 318 U.S. 523 (1943); *Reconstruction Finance Corp. v. Denver & Rio Grande Western R. Co.*, 328 U.S. 495 (1946).

In formulating a plan, priority treatment accorded a particular debt must be based upon the security pledged to that particular debt and "[t]he important element [in a plan] is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities." *Ecker*, 318 U.S. at 483. Full recognition must be given to the relative advantages which certain secured creditors have by reason of their higher priority and by reason of the value of the collateral securing their claim. If the value of the collateral differs, then there are different priorities and different priorities of treatment as between creditors must be accorded.

In that context, valuation of the collateral securing this Indenture is crucial because it is only after such valuation occurs that any determination can be made as to whether or not the Plan preserves to creditors the advantage of their respective priority. It is precisely that evaluation which the Court of Appeals dispensed with, notwithstanding the prior decisions of this Court.[5]

If the Court of Appeals in the *Wilmington Opinion* had followed *Consolidated Rock* and *Ecker*, and had considered all the assets securing the MCC Indenture, and had marshalled those assets not needed to satisfy the Gold Bond Mortgage to the MCC Indenture, the Court would

5. The Court of Appeals would appear to have recognized this infirmity because it recognized that the Plan's distribution takes no account of the amount of strength of the underlying security (App. A48).

have found that the MCC Indenture was as secure as the Mohawk & Malone Mortgage, and thus entitled to a distribution of 10% cash and 90% Series A Bonds, or at a minimum entitled to Series A Preference Stock.

III. The MCC Indenture Bondholders Have Not Received Fair and Equitable Treatment Under the Plan of Reorganization Because Neither the Reorganization Court Nor the Court of Appeals Conducted an Informed Evaluation of the Reasonable Range of Litigation Possibilities.

The second test which must be applied is whether the Plan's compromises are fair. As this Court stated in *TMT Trailer:*

> "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." 390 U.S. at 424-25.

In the *Irving Opinion,* the Court of Appeals recognized its duty under *TMT Trailer* and after reviewing all of the facts and conducting a "worst case" analysis, concluded that as to the Irving Trust Company Indentures, the Plan's distribution represented a "fair and equitable compromise of the litigation possibilities." (App. A101-A103). In that regard, the Court of Appeals held that in a worst case liquidation analysis, the nine classes of prior administrative and priority claims would prime all but 41% of Debtor's encumbered assets at the close of a liquidation. The Court then noted that the New York Central 6% Bonds were roughly 100% secured and that the value of the distribution to that super-secured creditor was approximately 60% of its total claim. Since, on a worst case analysis, the collateral securing these bonds might be reduced to only 41% of the claim, the Court found the distribution under the Plan which amounted to approximately 60% of the claim was within the range of litigation possibilities (App. A102).

Significantly, the Court of Appeals failed to perform the foregoing analysis, or anything approaching that, in the *Wilmington Opinion.* Specifically, the Court:

> (1) found that it was impossible to value the collateral securing the MCC Indenture. See Reason II, *supra.*
>
> (2) refused to form "an opinion of the probabilities of ultimate success should the claim be litigated" as required by *TMT Trailer* stating that "with nine classes of prior claimants . . ., there is no way to establish relative priorities of secured creditors without litigation of every potential claim." (App. A55).
>
> (3) failed to conduct a "worst case" liquidation analysis of the Gold Bond Mortgage to see if in fact, "there would be no excess assets to secure the claim of the holder of a second lien"—the MCC Indenture (App. A56).

If the Court of Appeals had performed a similar analysis in the *Wilmington Opinion* and had included a

value of only $60 million for the Park Avenue rentals, it would have found that this Indenture would be over 100% secured after payment of *all administrative and priority claims under the Court of Appeals' own worst case analysis*[6] (compare, App. A102).

Carrying the Court's analysis in the *Irving Opinion* one step further, the Court of Appeals would have concluded that the Plan's distribution to the MCC Indenture bondholders of between 45 and 50% of their claim (App. A255) when their claim would survive a worst case liquidation does not fall within the range of litigation possibilities and that additional compensation is mandated.

Thus, in the *Wilmington Opinion*, the Court of Appeals completely failed to conduct the analysis required by *TMT Trailer*—a failure which, in itself, is a sufficient departure from prior decisions of this Court to justify the issuance of a Writ.

CONCLUSION.

For the foregoing reasons, a Writ should issue to review the judgment and opinions of the Third Circuit.

Respectfully submitted,

RICHARD G. ELLIOTT, JR.,
MICHAEL A. MEEHAN,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
P.O. Box 551,
Wilmington, Delaware 19899
Attorneys for Wilmington Trust Company.

Dated: May 25, 1979

6. If the Harlem Lease properties in dispute were included, the percentage would be well in excess of 100%.